Supreme Court, U.S.
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No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1999

CHIEF PETTY OFFICER FREDERICK L. COZART, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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35 pp

QUESTION PRESENTED

IS RAPE OF AN ADULT WOMAN A CAPITAL OFFENSE WITH AN UNLIMITED STATUTE OF LIMITATIONS UNDER THE UNIFORM CODE OF MILITARY JUSTICE?

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1999

CHIEF PETTY OFFICER FREDERICK L. COZART, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

Chief Petty Officer Frederick L. Cozart, U.S. Naval Reserve (TAR), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The orders of the Court of Appeals for the Armed Forces, __ M.J. __, No. 990803/NA (C.A.A.F. January 24, 2000) and __ M.J. __, No 990803/NA (C.A.A.F. March 2, 2000) are not yet published and are located at Appendix A (App. 1a-4a). The opinion of the Navy-Marine Corps Court of Criminal Appeals, No. 9701396 (N.M.Ct.Crim.App. May 12, 1999) (unpublished opinion), is located at Appendix B (App. 5a-16a).

JURISDICTION

The United States Court of Appeals for the Armed Forces denied Petitioner's motion for reconsideration on March 2, 2000. (App. 3a-4a). This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

STATUTE INVOLVED

Until November 1986, 10 U.S.C. § 843, Article 43, Uniform Code of Military Justice, [hereinafter UCMJ], provided in pertinent part:

> (a) A person charged with desertion or absence without leave in a time of war, or with aiding the enemy, mutiny, or murder, may be tried and punished at anytime without limitation.
> (b) Except as otherwise provided in this article, a person charged with desertion in a time of peace or any of the offenses punishable under sections 919-932 of this title (articles 119-132) is not liable to be tried by court-martial if the offense was committed more than three years before the receipt of sworn charges by an officer exercising summary court-martial jurisdiction over the command.

After Article 43 was amended on November 14, 1986, it provided in pertinent part:

> (a) A person charged with absence without leave or missing movement in a time of war, or with any offense punishable by death, may be tried and punished at any time without limitation.
> (b) Except as otherwise provided in this section (article), a person charged with any offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

STATEMENT OF THE CASE

Petitioner was initially charged with the rape of Brigitte Ward, forcible sodomy upon Virginia Daniels, adultery with Lisa Hutchins, and several violations of the Navy's sexual harassment instruction. Charge Sheet. The alleged rape of Brigitte Ward occurred April 19, 1990, although Petitioner was not formally charged until August 28, 1996.[1]

Following Petitioner's arraignment on the initial charges on September 11, 1996, the convening authority referred additional charges to a different general court-

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[1] A charge was originally preferred in May 1996, but was withdrawn and re-preferred to reflect a major change. (Article 34, UCMJ, pretrial advice letter.)

martial. Record at 112-13. These additional charges alleged that Petitioner had raped his adult daughter, Chantrell Graham, in August 1996.

At trial Petitioner moved to dismiss the rape charge involving Brigitte Ward as barred by the statute of limitations. Appellate Exhibit I. The military judge denied Petitioner's motion to dismiss the charge of rape, holding that the statute of limitations for rape is indefinite. Appellate Exhibit XIII. Petitioner did not waive the issue. Record at 119, 120.

Petitioner was charged with and pled guilty to nine specifications of failure to obey an order, two specifications of rape, one specification of forcible sodomy, adultery, breaking restriction and incest, violations of Articles 92, 120, 125, 134, UCMJ [10 U.S.C. §§ 892, 920, 925 and 934] and Florida Statute 836.04. Petitioner's offenses were specifically charged as *non-capital* offenses. Charge Sheet. On November 14, 1996 Petitioner was sentenced to 32 years of confinement, forfeiture of all pay and allowances, reduction to the lowest enlisted rank and a dishonorable discharge. In accordance with a pretrial agreement, the convening authority suspended confinement in excess of 17 years for 17 years.

On May 2, 1999, the Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence. [App. 5a-16a] *United States v. Cozart*, No. 9701396 (N.M.Ct.Crim.App. May 2, 1999) (unpub. op.). On June 24, 1999, the Navy-Marine Corps Court of Criminal Appeals denied Petitioner's motion for *en banc* reconsideration. The United States Court of Appeals for the Armed Forces affirmed the decision of the lower court on January 24, 2000. [App. 1a-2a] *United States v. Cozart* __ M.J. __, No. 990803/NA (C.A.A.F. January 24, 2000). The United States Court of Appeals for the Armed Forces denied Petitioner's motion for reconsideration on March 2, 2000. [App. 3a-4a]

United States v. Cozart __ M.J. __, No. 990803/NA (C.A.A.F. March 2, 2000).

REASONS FOR GRANTING THE PETITION

The Courts of Appeal are split over the correct analysis to determine whether procedural laws predicated upon a crime "punishable by death" are invalidated by or survive a court's ruling that that crime may not be punished by death.

In *Coker v. Georgia*, 433 U.S. 584 (1977) this Court held that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is forbidden by the Eighth Amendment as cruel and unusual punishment. *Coker,* 433 U.S. at 592. By 1986 Congress brought federal criminal law in line with *Coker*. Title 18 U.S.C. § 2031, under which rape was a capital offense, was repealed and replaced with 18 U.S.C. § 2241. P.L. 99-654 §2, 100 Stat. 3660. The maximum punishment for rape under 18 U.S.C. § 2241 is life in prison.

On the same day 18 U.S.C. § 2031 was repealed, Congress enacted changes to 10 U.S.C. § 843 to bring the provisions of Article 43 in line with the federal criminal code provisions. P.L. 99-661, Div A, Title VIII, § 805, 100 Stat. 3908; S. Rep. No. 99-331, at 249 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6413, 6444. This changed the conceptual foundation of Article 43 from one based upon the nature of the crime to one based solely on the potential punishment.

An unforeseen result of the change to Article 43 was that rape inadvertently became an offense for which there was no statute of limitations. Under common principles of statutory construction and under the legal analysis used by

the federal circuit courts to determine whether procedural laws are invalidated by or survive a court's ruling that a crime may not be punished by death, in military as well as civilian federal law, there is a five-year statute of limitations for rape. The federal circuit courts generally agree on the proper analysis. However, the reasoning of the Court of Appeals for the Armed Forces is not in accordance with any of the Courts of Appeal that have addressed this issue.

A.

The Court of Appeals for the Armed Forces has departed from the established jurisprudence concerning the applicability of procedural rules regarding crimes punishable by death where the death penalty for that crime is unconstitutional or not permitted.

In the wake of this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), and other decisions holding that capital punishment was unconstitutional for certain crimes, the Courts of Appeal have used two different analytical frameworks for evaluating whether a procedural rule dependent on the existence of a crime punishable by death remains valid if the crime may no longer be punished by death.

The Eighth Circuit uses a very simple test. If the death penalty will not be imposed, either through judical action or through agreement of the parties, the case loses its capital nature. Therefore, the statutory provisions predicated upon a capital offense do not apply. *United States v. McNally*, 485 F.2d 398 (8th Cir.1973) cert. denied, 415 U.S. 978 (1974) (citing *Loux v. United States*, 389 F.2d 911 (9th Cir.), cert. denied, 393 U.S. 867 (1968)). In Petitioner's case the charge of rape lost its capital nature both through this Court's decision in *Coker* and through the convening

authority's decision to charge Petitioner with *non-capital* rape. Although the Court of Appeals for the Armed Forces did not cite *McNally* in *Willenbring v. Neurauter*, 48 M.J. 152 (1998), its decision rejects the *McNally* court's analysis.

The Second[2], Fourth[3] and Ninth[4] Circuits have all adopted a more complex test. In essence, the test is whether the procedural statute's purpose derives from the nature of the offense with which the accused is charged or if the statute's purpose derives from the potential severity of the punishment for the crime. *Manning*, 56 F.3d at 1196 (citing *United States v. Kennedy*, 618 F.2d 557, 558 (9th Cir. 1980) citing *Watson*, 496 F.2d at 1128). *See also Provenzano*, 423 F. Supp at 665 (citing *Watson*).

If the statute's purpose derives from the nature of the offense, it remains in effect. *Id.* If its purpose derives from the potential severity of the punishment, the procedural law will lose its effect if capital punishment for the underlying offense is no longer constitutional. *Id.*

By claiming to follow *Manning* yet failing to follow the test used in *Manning*, the Court of Appeals for the Armed Forces departed from this rule in *Wellenbring*.

Manning involved 18 U.S.C. § 1716, which criminalized mail bombing and made it punishable by death. However, the same Circuit had declared the death penalty for violation of Section 1716 unconstitutional. *United States v. Cheeley*, 36 F.3d 1439 (9th Cir. 1994). Manning argued that as a result of *Cheeley*, the applicable statute of limitations was 18 U.S.C. § 3282, establishing a five year limitation for crimes not capital. *Manning*, 56 F.3d at 1195. The court

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[2] *United States v. Provenzano*, 423 F. Supp 662 (S.D.N.Y 1976), *aff'd*, 556 F.2d 562 (2d Cir.1977).

[3] *United States v. Watson*, 496 F.2d 1125 (4th Cir. 1973).

[4] *United States v. Manning*, 56 F.3d 1188 (9th Cir. 1995).

disagreed, determining that Congress had intended to punish mail bombing at any time whenever an offender was caught. *Manning*, 56 F.3d at 1196. Therefore, because the statute of limitations for the crime of mail bombing was tied to the nature of the offense rather than the potential punishment, the unlimited statute of limitations remained in effect.

Watson involved 18 U.S.C. § 1111, murder, which is punishable by death. However, this Court's decision in *Furman* rendered the death penalty unconstitutional. 18 U.S.C. § 3005 requires a court to appoint a second counsel to a defendant in a capital case upon the defendant's request. Watson requested a second counsel, but his request was denied. *Watson*, 496 F.2d at 1126. The government argued that the request was properly denied because under *Furman* the crime was not capital. *Id.* The court disagreed, holding that absent a clear legislative expression, it could not say that the right to two attorneys was solely derived from the potential punishment of death. *Watson*, 496 F.2d at 1128. The court also noted that it was more likely that section 3005 derived from the nature of the offense, in that murder cases are complex cases that would require an additional attorney. *Id.* Therefore, because the provision for an additional court-appointed lawyer was probably not solely as a result of the potential punishment for murder, but because murder cases are complex cases, the right contained in 18 U.S.C. § 3005 was not tied to the potential punishment, but tied to the nature of the offense and thus remained in effect.

Provenzano involved 18 U.S.C. § 1201, which in 1961, the date of the alleged offense, made kidnapping a capital offense if the victim was not returned unharmed. *Provenzano*, 423 F. Supp at 664. However, this Court held the death penalty provision of the statute unconstitutional in *United States v. Jackson*, 390 U.S. 570 (1968). Moreover, in 1972 Congress amended 18 U.S.C. § 1201, eliminating the

possibility of capital punishment for the crime. *Provenzano*, 423 F. Supp at 664. The court reasoned that it may have been the complexity and serious nature of the crime rather than simply the possibility of the death penalty that led Congress to make the statute of limitations unlimited for Provenzano's alleged crime. *Provenzano*, 423 F. Supp at 665, 666. If the court were to make its decision on the basis of *Jackson* alone, it would hold that *Jackson* did not make section 1201 non-capital for purposes of the statute of limitations. *Provenzano*, 423 F. Supp at 666.

However, the *Provenzano* court had additional information in the form of Congress' amendment of section 1201 which removed the death penalty provision and made it obvious that the unlimited statute of limitations was solely a result of the potential penalty for the crime. The court held that the five-year statute of limitation of 18 U.S.C. § 3282 applied to prosecutions under 18 U.S.C. § 1201, even though when allegedly committed the crime was a capital offense. *Provenzano*, 423 F. Supp at 667.

Willenbring involved 10 U.S.C. § 920, which criminalized rape and made it punishable by death. However, this Court had declared the death penalty for rape of an adult woman unconstitutional. *Coker v. Georgia*, 433 U.S. 584 (1977). Willenbring argued that as a result of *Coker*, there could be no capital offense and thus the statute of limitations was five years. *Willenbring*, 48 M.J. at 178. The court disagreed, adopting the *result* of *Manning*, that Congress had intended to punish some crimes at any time whenever an offender was caught. *Manning*, 56 F.3d at 1196 (mail bombing). However, the *Willenbring* court failed to conduct the legal analysis the *Manning* court performed. Had the lower court applied any legal analysis of the issue, it would have decided differently. By adopting without analysis the *result* of *Manning*, the Court of Appeals for the Armed

Forces rejected the legal reasoning and analysis of *Manning, Watson and Provenzano*. Without citing to *McNally*, the Court of Appeals for the Armed Forces also rejected the Eighth Circuit's test for evaluating whether a procedural rule dependent on the existence of a crime punishable by death remains valid if the crime may no longer be punished by death.

B.
Application of the proper legal analysis to Petitioner's case.

The question in the instant case is whether the statute of limitation's purpose derives from the nature of the offense of rape or if the statute of limitation's purpose derives from the potential severity of the punishment for rape.

From its inception in 1950 until 1986, the statute of limitations for violations of the Uniform Code of Military Justice, Article 43, was based upon the nature of the crime, not upon the possible punishment for the crime. Murder, mutiny, aiding the enemy and desertion or absence without leave during time of war were the only "types[s] of offense that should not have any statute [of limitations] at all, by virtue of its extreme seriousness." Uniform Code of Military Justice: Hearings on H.R. 2498 before a subcommittee of the Committee on Armed Services, House of Representatives, 81st Cong. 1032 (1949). One member of the subcommittee, Mr. Elston, did wonder why felonies such as rape, robbery, burglary, arson, *et cetera*, were not also given an unlimited statute of limitations. *Id.* at 1032, 1033. Mr. Larkin explained to him that generally the States *did* have statutes of limitations for most felonies, and that neither of the predecessors to the UCMJ, the Articles of War and the

Articles for the Government of the Navy, exempted such felonies from the statute of limitations. *Id.* at 1034. With the exception of the capital offense "aiding the enemy" there were *no* crimes added to the list of crimes whose nature demanded that there should be no statute of limitations. Although the question was raised, it was the judgement of Congress that the crime of rape *would* have a statute of limitations.

As opposed to the original Article 43, UCMJ, the federal civilian statutes of limitation are based upon the potential punishment for an offense. The statutes of limitation for federal offenses are 18 U.S.C. § 3281 and 18 U.S.C. § 3282.

Section 3281 provides:

> An indictment for any offense punishable by death may be found at any time without limitation except for offenses barred by the provisions of law existing on August 4, 1939.

Section 3282 states:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

In 1986 Congress amended Article 43 to bring it in line with the federal criminal code provisions on the statute of limitations. S. REP. NO. 99-331, at 249 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6413, 6444. The effect of this amendment was to change the military statute of limitations from one based upon the nature of the crime to a statute of

limitations based upon the possible punishment for a crime. On the same day, Congress amended the federal rape statue. As a result, the maximum punishment for the crime of rape was set at life imprisonment. 18 U.S.C. § 2241. Thus, the federal statute of limitations for rape was set at five years. 18 U.S.C. § 3282.

If the statute's purpose derives from the nature of the offense, it remains in effect. *Manning*, 56 F.3d at 1196 (citing *United States v. Kennedy*, 618 F.2d at 558 citing *Watson*, 496 F.2d at 1128). *See also Provenzano*, 423 F.Supp at 665 (citing *Watson*). However, if its purpose derives from the potential severity of the punishment, the statute of limitation will lose its effect if capital punishment for the underlying offense is no longer permissible. *Id.*

In this case it is abundantly clear that the current unlimited statute of limitations is based solely upon the potential severity of punishment; in fact, the plain language of the statute reveals that it is predicated upon the seriousness of the potential punishment. By way of comparison, under the former military statute of limitations, which was based instead on the nature of the crime itself, the statute of limitations was 3 years.

Furthermore, Congress has decided that even under a statute of limitations based upon the potential severity of punishment, the statute of limitations for rape shall be five years.

For the reasons cited in *Manning*, *Watson* and *Provenzano*, the unlimited statute of limitations for offenses punishable by death does not apply to the crime of rape. Moreover, the additional reasoning found in *Provenzano* regarding subsequent acts by Congress further strengthens this conclusion.

CONCLUSION

The majority of civilian federal circuit courts that have addressed the issue of whether to apply procedural rules predicated upon the concept of a crime punishable by death have done so in a consistent manner. If the procedural statute's purpose derives from the nature of the offense with which the accused is charged, the statute remains in effect. If the statute's purpose derives from the potential severity of the punishment for the crime, the law will lose its effect where capital punishment for the underlying offense is no longer possible. Both this Court and Congress have decided that rape may not be punished by death. Congress has also decided that in the military, the crime of rape is not a crime that by its nature must have no statute of limitations. When Congress, in addition to the judiciary, makes the determination that an offense is not punishable by death, as is the case here, this conclusion is made even more clear.

Although in *Willenbring* the Court of Appeals for the Armed Forces purported to follow the 9th Circuit's decision in *Manning*, the court followed only the *result* of *Manning*. Curiously, the court neither followed nor even mentioned the legal analysis in *Manning*. To apply the proper legal test, used by the Second, Fourth and Ninth Circuit courts, leads to the opposite result; that the prosecution for the rape of Brigitte Ward is time-barred.

During this, the 50th anniversary of the Uniform Code of Military Justice, this Court should grant review of this issue. This is essential to correct the error of the lower court, protect the statutory rights of servicemembers and most importantly, to bring the jurisprudence of the Court of Appeals for the Armed Forces into line with that of the other federal courts.

Respectfully submitted,

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May 2000

APPENDIX A
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
WASHINGTON, D.C. 20442-0001

UNITED STATES,	) USCA Dkt.
	) No. 99-0803/NA
Appellee	) Crim.App. No. 97-1396
	)
v.	)
	) ORDER
Frederick L.	)
COZART (288-56-4723),	)
Appellant	)

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, it is, by the Court, this 24th day of January, 2000,

ORDERED:

That said petition is hereby granted on the following issue:

WHETHER THE MILITARY JUDGE CORRECTLY DENIED APPELLANT'S MOTION TO DISMISS THE ADDITIONAL CHARGE OF RAPING [BW] BECAUSE THE FIVE-YEAR STATUTE OF LIMITATIONS UNDER ARTICLE 43 HAD RUN.

We hold that the military judge did not err. Accordingly, the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,

/s/ Thomas F. Granahan
Clerk of the Court

*Judge Effron did not participate in this decision. See United States v. Gorski, 48 MJ 317, 324, n. 9. This is without prejudice to his future participation in this case should it subsequently be presented to the Court in a manner that does not require determination of the application of the Ex Post Facto Clause to the amendments to Title 10, United States Code, made by the National Defense Authorization Act for Fiscal Year 1996, Pub.L. No. 104-106, 110 Stat. 462-63 (1996).

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (HARRIS)
Appellate Government Counsel (O'GRADY)

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
WASHINGTON, D.C. 20442-0001

UNITED STATES,	) USCA Dkt.
	) No. 99-0803/NA
Appellee	) Crim.App. No. 97-1396
	)
v.	)
	) ORDER
Frederick L.	)
COZART (288-56-4723),	)
Appellant	)

On consideration of appellant's petition for reconsideration of the order of the Court issued on the 24th day of January, 2000 and motion to substitute, it is, by the Court, this, 2nd day of March, 2000,

ORDERED:

That said petition for reconsideration is hereby denied; and

That said motion to substitute is hereby denied.

For the Court*,

/s/ Thomas F. Granahan
Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (HARRIS)
Appellate Government Counsel (O'GRADY)

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*Judge Effron did not participate in this decision. See United States v. Gorski, 48 MJ 317, 324, n. 9. This is without prejudice to his future participation in this case should it subsequently be presented to the Court in a manner that does not require determination of the application of the Ex Post Facto Clause to the amendments to Title 10, United States Code, made by the National Defense Authorization Act for Fiscal Year 1996, Pub.L. No. 104-106, 110 Stat. 462-63 (1996).

APPENDIX B

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON D.C.

BEFORE

K.T. SEFTON **JOHN W. ROLPH**
DAVID W. PAULSON

UNITED STATES

v.

Frederick L. COZART, 288-56-4723
Chief Personnelman (Aviation Warfare)
(E-7), U.S. Naval Reserve (TAR)

NMCM 97 01396 Decided 12 May 1999

Sentence adjudged 14 November 1996. Military Judge: D.J. D'Alesio, Jr.
Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Base Jacksonville, Naval Air Station, Jacksonville, FL.

LT DALE O. HARRIS, JAGC, USNR, Appellate Defense C ounsel
LT J.K. O'GRADY, JAGC, USNR, Appellate Government Counsel

PAULSON, Judge:

Pursuant to his pleas, the appellant was found guilty at a general court-martial, military judge alone, of 6 specifications of sexual harassment, 2 specifications of violating lawful orders, providing alcohol to a minor, 2 specifications of rape, forcible sodomy, adultery, breaking restriction, and incest, in violation of Articles 92, 120, 125, and 134, Uniform Code of Military Justice, 10 U.S. C. §§ 892, 920, 925, and 934 (1994). He was sentenced to 32 years confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. In his initial action dated 19 June 1997, the convening authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed. Pursuant to a pretrial agreement, the convening authority suspended for a period of 17 years from the date of his action that portion of the sentence adjudging confinement in excess of 17 years. In a supplemental action dated 11 January 1999, the convening authority also suspended for 6 months from the date of his supplemental order that portion of the sentence adjudging forfeitures of $500 pay per month. He then waived the automatic forfeiture of $500 pay per month for 6 months, pursuant to Article 58b, UCMJ, contingent upon payment of all such monies to the appellant's dependent spouse.

We have carefully reviewed the record of trial, the appellant's assignments of error[1], and the Government's response.

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[1] I. THE MILITARY JUDGE ERRED WHEN HE DENIED DEFENSE COUNSEL'S MOTION TO DISMISS THE ADDITIONAL CHARGE OF RAPING BW BECAUSE THE FIVE-YEAR STATUTE OF

LIMITATIONS UNDER ARTICLE 43, UCMJ, HAD RUN.

II. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL DEFENSE COUNSEL FAILED TO REQUEST THE SUPPORTING DOCUMENTS FROM DNA TESTING PERFORMED ON CRUCIAL EVIDENCE IN THIS CASE.

III. THE MILITARY JUDGE COMMITTED PLAIN ERROR BY ALLOWING A WITNESS TO TESTIFY VIA TELEPHONE DURING APPELLANT'S SENTENCING HEARING.

IV. THE CHANGES TO ARTICLE 57, UCMJ, AND THE ADDITION OF ARTICLE 58b, UCMJ, VIOLATE THE *EX POST FACTO* CLAUSE OF THE CONSTITUTION WITH RESPECT TO THE APPELLANT.

V. APPELLANT WAS DENIED DUE PROCESS OF LAW, WHERE THE DEFENSE FINANCE AND ACCOUNTING SERVICE REFUSED TO EXECUTE CLEMENCY GRANTED BY THE SECRETARY OF THE NAVY IN THE NATURE OF WAIVING FORFEITURES OF $500 PER MONTH.

VI. A 17-YEAR PERIOD OF SUSPENSION IS UNREASONABLY LONG AND THEREFORE AGAINST PUBLIC POLICY.

VII. THE MILITARY JUDGE SHOULD HAVE

RECUSED HIMSELF FROM PARTICIPATION AS THE SENTENCING AUTHORITY IN APPELLANT'S CASE, WHERE THE MILITARY JUDGE WAS THE FORMER COMMANDING OFFICER OF NAVAL LEGAL SERVICE OFFICE SOUTHEAST, AND WHERE THE MILITARY JUDGE RECEIVED EXTENSIVE EVIDENCE ABOUT APPELLANT'S ALLEGED OFFENSES DURING THE PRETRIAL MOTION STAGE.

VIII. APPELLANT'S COURT-MARTIAL LACKED JURISDICTION WHERE APPELLANT'S COMMANDING OFFICER (REDCOM 8) HAD AUTHORITY TO CONVENE A GENERAL COURT-MARTIAL FOR ANY CHARGES AGAINST APPELLANT, BUT INSTEAD TRANSFERRED THE CASE TO COMMANDER, NAVAL BASE JACKSONVILLE, WITHOUT GOOD CAUSE.

IX. APPELLANT'S COURT-MARTIAL WAS TAINTED BY UNLAWFUL COMMAND INFLUENCE, AS EVIDENCED BY: 1) THE ARBITRARY TRANSFER OF THE CHARGES FROM REDCOM 8 TO COMMANDER, NAVAL BASE JACKSONVILLE; 2) APPELLANT'S REMOVAL FROM HIS HOME AND FAMILY PENDING TRIAL WITHOUT REGARD TO HIS WIFE'S SERIOUS MEDICAL CONDITION; 3) APPELLANT'S DENIAL OF ACCESS TO WITNESSES WHICH COULD HAVE HELPED IN HIS DEFENSE; 4) THE FACT THAT SEVERAL WITNESSES DECLINED TO ASSIST APPELLANT AFTER BEING INTERVIEWED BY INVESTIGATORS, BECAUSE OF THEIR FEAR OF

While we have carefully considered each assigned error, we discuss only those which require specific comment or clarification.

CAREER REPERCUSSIONS IF THEY TESTIFIED ON APPELLANT'S BEHALF.

X. APPELLANT HAS BEEN SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF HIS EIGHTH AMENDMENT RIGHTS, WHERE THE UNITED STATES DISCIPLINARY BARRACKS WILLFULLY DISREGARDED ITS OWN PROCEDURAL RULES AND ENGAGED IN DELIBERATE DILATORY TACTICS BY REFUSING APPELLANT'S REQUEST FOR EMERGENCY LEAVE AND/OR EMERGENCY PAROLE IN ORDER TO ASSIST HIS WIFE FOLLOWING CANCER SURGERY.

XI. APPELLANT'S COURT-MARTIAL LACKED JURISDICTION WHERE THE MILITARY JUDGE AND STAFF JUDGE ADVOCATE WERE NOT PROPERLY CERTIFIED; SPECIFICALLY, NEITHER WAS AN ACTIVE MEMBER OF HIS RESPECTIVE STATE BAR AT THE TIME OF TRIAL.

XII. AN INQUIRY INTO APPELLANT'S MENTAL CAPACITY AND MENTAL RESPONSIBILITY SHOULD HAVE BEEN ORDERED, DUE TO APPELLANT'S EXTREME DURESS BEFORE AND DURING TRIAL.

We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Statute of Limitations

The appellant's first assignment of error relates to the Additional Charge and the sole specification thereunder which alleges a violation of Article 120, UCMJ, the rape of Aviation Electronics Technician Second Class W on or about 19 April 1990. The appellant's contention is that since this offense was alleged to have occurred more than 5 years prior to the preferral of the charge on 28 August 1996, and since the offense was referred non-capital, that prosecution is barred under the 5-year statute of limitations set forth in Article 43, UCMJ. We disagree.

Our superior court recently decided the case of *Willenbring v. Neurauter*, 48 M.J. 152 (1998). Therein, the court undertook a thorough analysis of the very issue in this case and held that if an offense is one "punishable by death" it is exempt from the 5-year statute of limitations regardless of whether it is referred capital or non-capital.[5] *Willenbring*, 48 M.J. at 180. This court had earlier reached a similar conclusion in *United States v. Gonzales*, 46 M.J. 667 (N.M.Ct.Crim.App. 1997), *aff'd*, No. 97-0755 (C.A.A.F. Jan. 15, 1999). Accordingly, we find no merit in this assignment of error.

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[5] The crime of rape, in violation of Art. 120, UCMJ, is punishable by "death or such other punishment as a court-martial may direct." MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 45e(1).

Ineffective Assistance of Counsel

In his second assignment of error, the appellant contends that he was denied effective assistance counsel when his trial defense counsel failed to request supporting documents for the DNA testing with reference to Additional Charge I and its sole specification which alleges a violation of Article 120, UCMJ, the rape of the appellant's daughter, CG. This assignment of error is without merit.

The standard of review for a claim of ineffective assistance of counsel, as applied to courts-martial, is found in *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987)(citing *Strickland v. Washington*, 466 U.S. 668 (1984)). The competence of an accused's counsel is presumed. *Scott,* 24 M.J. at 188. To rebut this presumption, an accused must satisfy a two-prong test by showing that (1) his counsel's performance was deficient, and (2) the deficiency prejudiced his defense. *Id.*

The appellant has failed to satisfy either prong of this test. Pursuant to the terms of a pretrial agreement, the appellant entered into a stipulation of fact wherein he admitted the rape of CG and then entered an unconditional plea of guilty to the charge and specification. Prosecution Exhibit 1 at 9-11; Record at 132-134, 136-139. We concur with the military judge's finding that the plea was provident, and we will not now engage in speculation regarding tactical decisions made by the appellant and his trial defense counsel. We find that trial defense counsel were not deficient in their performance. Likewise, we find no prejudice to the appellant's substantial rights or any plausible reason for requiring the production of the requested documents where the appellant

stipulated to his guilt and pled providently to the offense in the court below.

Telephonic Testimony During Sentencing

The appellant next asserts that it was plain error for the military judge to permit CG to testify remotely over a speaker telephone during sentencing. We find no merit in this argument. RULE FOR COURTS-MARTIAL 1001(e)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.) specifically states that "[d]uring the presentence proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses." Thus, it was clearly "a matter within the discretion of the military judge," to permit this victim to provide impact testimony either in person or by other means. *Id.* Furthermore, the appellant affirmatively consented to the taking of the testimony of CG by telephone. Record at 189. Therefore, the appellant forfeited this issue in the absence of plain error. *See United States v. Powell*, 49 M.J. 460 (1998). We conclude that there was no prejudice to the appellant's substantial rights, and he, therefore, is entitled to no relief. Art. 59(a), UCMJ.

***Ex Post Facto* Violation**

The appellant's contention that the changes to Articles 57 and 58b, UCMJ, violate the *ex post facto* clause of the Constitution is without merit. *See United States v. Carter*, __ M.J. __, No. 97-1121 (C.A.A.F. Order Aug. 20, 1998).

Due Process

The appellant's fifth assignment of error is moot. Any possible prejudice was overcome upon the issuance of the convening authority's Supplemental Court-Martial Order No. 1-99, dated 11 January 1999, wherein adjudged and automatic forfeitures of $500 pay per month were, respectively, suspended and waived for a period of six months.

Unreasonably Long Period of Suspension

We find no merit in the appellant's next assignment of error. As we stated in *United States v. Ratliff*, 42 M.J. 797, 802 (N.M.Ct.Crim.App. 1995), "Placing an appellant on probation for the entire period of his confinement is reasonable as a control and motivating measure and is not violative of public policy or of R.C.M. 1108(d)."

Recusal of Military Judge

The appellant contends in his seventh assignment of error that the military judge should have recused himself since he had previously served as commanding officer of Naval Legal Service Office Southeast and had, in such capacity, received evidence about the appellant's offenses. R.C.M. 902 sets forth the grounds for disqualification of a military judge. In the context of this case, the military judge need only have recused himself if his impartiality might have been reasonably questioned, R.C.M. 902(a), or if he had a personal bias or prejudice. R.C.M. 902(b)(1)(emphasis added). No evidence was adduced at trial, nor is any presented on appeal, to demonstrate a personal interest in the appellant's case or a basis for reasonably questioning the

military judge's impartiality.

We further find that even if there were some remotely possible basis for disqualification, the military judge's failure to recuse himself was not plain error. We find no prejudice to the appellant's substantial rights in the record before us. Art. 59(a), UCMJ.

Unlawful Command Influence

In order to prevail on a claim of unlawful command influence, the appellant must "(1) 'allege[] sufficient facts which, if true, constitute unlawful command influence'; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the proximate cause of that unfairness." *United States v. Stombaugh*, 40 M.J. 208, 213 (C.M.A. 1994) (quoting *United States v. Levite*, 25 M.J. 334, 341 (C.M.A. 1987)(Cox, J., concurring)).

Our superior Court has defined what it means, in an appellate context, to "show" that the proceedings were unfair because of unlawful command influence. *United States v. Reynolds*, 40 M.J. 198, 202 (C.M.A. 1994). The Court also noted that no prejudice is presumed unless the defense presents evidence of proximate causation between the acts constituting unlawful command influence and the outcome of the court-martial. *Reynolds*, 40 M.J. at 202.

Although the threshold for raising the issue of unlawful command influence at trial is low, the evidence required must be more than mere allegation or speculation. *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994). The evidentiary standard for raising the issue has been determined to be the same as that required to raise an issue of

fact, i.e., "some evidence." *United States v. Ayala*, 43 M.J. 296, 300 (1995).

Here, we are presented with absolutely nothing more than the appellant's self-serving affidavit. Nonetheless, based on our careful review of the entire record, we find no support for the appellant's claim. His allegations of unlawful command influence are without merit.

Mental Capacity and/or Mental Responsibility

In his final assignment of error, the appellant alleges, for the first time, that he suffered duress during the pendency of the court-martial proceedings. He further asserts that, due to the negative impact of such duress, an inquiry should have been ordered into his mental capacity and/or mental responsibility.

R.C.M. 706 sets forth the guidelines for inquiring into the accused's mental capacity or mental responsibility. At no time during the entire proceeding did the evidence suggest that the appellant suffered from either a lack of mental capacity or mental responsibility. On the contrary, the appellant entered pleas of guilty and engaged in a lengthy providence inquiry with the military judge who subsequently determined those pleas to be freely and voluntarily made. Record at 187. Even if we were to find some evidence of his present claim, which we most assuredly do not, these matters were waived by his unconditional guilty pleas. R.C.M. 905(e); R.C.M. 910(j); *United States v. Boasmond*, 48 M.J. 912, 916 (N.M.Ct.Crim.App. 1998)(citing *United States v. Lewis*, 34 M.J. 745, 750 (N.M.C.M.R. 1991)). The appellant's claim is without merit.

Conclusion

Accordingly, we affirm the findings of guilty and the sentence, as approved below.